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No. 98-1346

In the

Supreme Court of the United States

October Term, 1998

H. N. AND FRANCES C. BERGER FOUNDATION,
Petitioner,

v.

CITY OF ESCONDIDO, JERRY HARMON, individually and as a member of the City of Escondido Mobilehome Rent Review Board; SID HOLLINS, individually and as a member of the City of Escondido Mobilehome Rent Review Board; RICHARD A. FOSTER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; LORI HOLT PFEILER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; ELMER CAMERON, individually and as a member of the City of Escondido Mobilehome Rent Review Board,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITIONER'S REPLY BRIEF

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Pursuant to Supreme Court Rule 15.6, Petitioner H. N. and Frances C. Berger Foundation (Berger Foundation) hereby replies to the Respondents' Brief in Opposition (Opp.) filed by Respondents City of Escondido, *et al.* (City), on March 24, 1999.

The petition for certiorari asks this Court to take up a question raised but left unanswered in *Yee v. City of Escondido*, 503 U.S. 519 (1992), whether the application of Escondido's mobile home park rent control law, which transfers marketable interests in the Berger Foundation's mobile home park to certain residents of that park without just compensation, comprises a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The opposition brief does not address the merits of this question, but instead raises a number of procedural and prudential side issues. As will be demonstrated below, none of these side issues has merit.

I

THE RECENT DISCOVERY THAT THE CITY WAS WITHOUT AUTHORITY TO IMPOSE VACANCY CONTROL UNDER THE RENT ORDINANCE DOES NOT ALTER THE FACT THAT THE CITY *DID* UNLAWFULLY ENFORCE VACANCY CONTROL THROUGHOUT THE PERIOD RELEVANT TO THIS LITIGATION

Although the City concedes that this case involves a challenge to the same ordinance that was at issue in *Yee*, and that the Berger Foundation raises "virtually identical allegations" as the *Yee* plaintiffs, Opp. at 13, the City nevertheless argues that this case does not present an appropriate vehicle to address the regulatory taking question left open in *Yee*.

The City bases this peculiar argument on a 1996 California Court of Appeal opinion construing the Rent Ordinance to exclude vacancy control. Opp. at 14. Vacancy control--the

maintaining of rent restrictions even after a leasehold ends--is thought to be an important factor in generating and transferring to park residents the "placement value," or premium, that is the basis of the taking claim. *See* Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 426-32 (1988). Just how important it may be in any given case, of course, is a factual question that must be determined at trial. Nevertheless, the City asserts that the Berger Foundation's taking claim is fatally undermined because the Foundation *may* have been able to set new rents on vacancy "since at least March 1996"--26 months *after* the events that gave rise to this litigation! Opp. at 15.

Throughout the time period relevant to this case, the City vigorously enforced the Rent Ordinance as if it did in fact provide for vacancy control. Indeed, the City's zeal extended so far as to initiate criminal prosecution of park owners who attempted to increase space rents when a mobile home in their park changed ownership.[1] Under these circumstances, of course, all parties consistently acted *as if* the Rent Ordinance included vacancy control.

Whether the subsequent revelation that the City had no legal basis for its punitive enforcement actions would affect the Berger Foundation's damages for the 1991-95 period is, again,

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[1] In June, 1995, 16 months after the complaint in this case was filed, the City notified a park manager that under the Rent Ordinance,

> if you offer a new resident a month to month tenancy . . . for a space in your park, that resident would be entitled to the same space rent as the present tenant. . . . Should you raise your rents to new tenants for tenancy of 12 months or less you will be in violation of the City's Rent Control Ordinance *and subject to criminal action*.

Thomsen v. City of Escondido, 49 Cal. App. 4th 884, 888-89 (1996) (emphasis added).

a factual question for the trial court to consider on remand.[2] However, it has no relevance whatsoever to the question that was before the court below and is now before this Court, of whether--*assuming the facts alleged in its 1994 complaint are true*--the Berger Foundation has adequately set forth a claim for a regulatory taking.

II

A REGULATORY SCHEME THAT IS UNCONSTITUTIONAL ON ITS FACE CANNOT BE CONSTITUTIONAL AS APPLIED TO ANY PARTICULAR PROPERTY

The principal argument of the opposition brief is that the Berger Foundation has set forth allegations which, if proven at trial, would establish that the Rent Ordinance violates the Takings Clause *on its face*, yet the complaint alleges a constitutional violation *as applied* to the Berger Foundation's property. Opp. at 16-20. In essence, the City's argument is that a law such as the Rent Ordinance, which is alleged to advance no purpose except to effect a one-time wealth transfer to a small political elite, can *only* be challenged on its face. Once the statute of limitations for facial challenges runs, no property owner can ever again contest the *application* of the Rent Ordinance to any specific property based on its failure to substantially advance legitimate state interests.

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[2] The City cites to the fallacious claim of the court below that the *prospective* repeal (or judicial invalidation) of the Rent Ordinance would somehow eliminate all the damages the Berger Foundation suffered from ten years of the City's heavy-handed enforcement of its unconstitutional regulations. Opp. at 16. As is typical of the decision below, however, this is simply the court's *speculation* concerning an empirical question that should rightfully be determined at trial.

The City cites to a small number of state and federal courts that have accepted this argument (Opp. at 18-19). However, these decisions miss the thrust of the Berger Foundation's complaint. The City has stipulated that the value of the Berger Foundation's mobile home park has been reduced by the existence of the Rent Ordinance, and the City has applied the ordinance to prevent the Foundation from implementing rent increases to which it was otherwise entitled. Appendix to the Petition for Certiorari (Pet. App.) A-4-5. The City claims the Rent Ordinance gives it the authority to thus interfere with the peaceful use and enjoyment of the Berger Foundation's property. Yet if the Rent Ordinance is unconstitutional on its face--that is, if it utterly fails to substantially advance a legitimate state interest and is unconstitutional *no matter how it is applied*, it cannot lawfully be applied to impose financial burdens on the Berger Foundation's property. From this perspective, it is completely irrelevant that those who illicitly profited from the adoption of the Rent Ordinance did so at the time the measure was passed. The City is still using this measure--which serves only to maintain the value of a one-time wealth transfer that took place a decade ago--to impose ongoing burdens on property owners like the Berger Foundation.

Stripped of sophistry, the City's argument is that once it has gotten away with applying an unconstitutional enactment for five years, its victims thereafter lose their rights to challenge the application of the measure to their land. This is not the law. If, as the Berger Foundation alleges, the sole function of the Rent Ordinance was to enable initial residents of the Town and Country to capture a one-time wealth transfer from the Berger Foundation, the City cannot constitutionally apply this law to restrict the Berger Foundation's use of its property without complying with the constitutional mandate of just compensation.

III

THE CONFLICTS IDENTIFIED IN THE PETITION REQUIRE THIS COURT'S ATTENTION TO RESTORE UNIFORMITY OF TREATMENT OF REGULATORY TAKING CLAIMS UNDER THE FIFTH AMENDMENT

A. The Decision Below Stands in Direct Conflict with the Ninth Circuit's *Richardson* Decision

The City misapprehends the extent and significance of the conflict of the decision below with the Ninth Circuit Court of Appeals' opinion in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). The City attempts to distinguish *Richardson* on three grounds. First, the opposition brief argues that *Richardson* involved allegations of a "facial" taking rather than a taking as applied to a particular property. Opp. at 20, 23. Second, the City urges that owners of mobile home coaches are entitled to greater governmental protections than owners of condominium apartments. Opp. at 21-22, 23-24. Finally, the City suggests that its Rent Ordinance may substantially advance *some* legitimate state interest, even if--like the *Richardson* rent ordinance--it fails to preserve or increase the supply of affordable housing. Opp. at 22-23. None of these distinctions cuts in the City's favor.

As has been set forth above, no logic supports the City's position that an ordinance which is *facially* unconstitutional could somehow become constitutional as applied to a particular property. If laws like those at issue in *Richardson* and in the present case fail to substantially advance a legitimate interest "no matter how [they] are applied,"[3] they must certainly fail the same test in the context of a specific as-applied challenge.

Whether residents of mobile home parks should receive greater governmental benefits than residents of condominium apartments is, of course, a question for the legislature, not the

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[3] *Yee*, 503 U.S. at 534.

courts. However, the allegedly inferior "bargaining power" of mobile home residents (Opp. at 23-24) does not trump the plain text of the Takings Clause. Nor is there any significance to the City's recitation of California cases that have upheld mobile home rent control against taking challenges. Opp. at 22. What the City neglects to point out is that, over the period in question, *no California court found a compensable regulatory taking under any circumstances whatsoever.* The plaintiffs in the cases cited by the City did not lose because they were challenging mobile home rent control. They lost simply because they were property owners, who have uniformly been denied just compensation in every reported Fifth Amendment regulatory taking case filed in the California courts for at least the past 20 years. No special consideration attached to the fact that the challenged regulations involved mobile home parks.

Finally, the City is not technically correct in claiming that the purposes of the Rent Ordinance are "much broader" than those of the *Richardson* rent law. Opp. at 23. For in fact, *the Rent Ordinance sets forth no statement of purpose or necessity whatsoever.* Pet. App. E-1. However, this does not give reviewing courts a blank check to *imagine* that some legitimate interest might possibly be advanced, as was done in the decision the City cites. Opp. at 23. This is precisely the kind of deferential review this Court foreclosed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[4]

By the City's reasoning, the *Richardson* ordinance would have been upheld if only its drafters had been devious enough

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[4] "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.'" *Nollan*, 483 U.S. at 834 n.3.

not to state the law's objectives. Although this ploy has met with success in the California courts, it would not be enough to salvage the constitutionality of the Rent Ordinance in the Ninth Circuit under *Richardson.*

B. The Conflict Between the State Courts of New York and California Must Be Resolved

In addition to conflicting with the Ninth Circuit's *Richardson* opinion, the decision below exemplifies a deep-seated conflict between the state courts of California and New York on the application of federal constitutional law. The City minimizes the conflict with *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (1994), by dwelling on trivial factual distinctions. Opp. at 27-29. It is certainly true, as the City notes, that "neither *Seawall* nor *Manocherian* involved mobilehome ordinances." Opp. at 29. But there is no exception to the Takings Clause for mobile home parks. In both *Seawall* and *Manocherian* the New York Court of Appeals found that rental property regulations violated the Takings Clause by failing to substantially advance legitimate state interests, under the close scrutiny required by this Court in *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). As the City itself points out, this is precisely the analysis the court below and the California Supreme Court have held to be ***inapplicable*** to rent control ordinances. Opp. at 26; Pet. App. A-13-15. This is a fundamental legal conflict in the application of federal constitutional law by the courts of the most populous states in this nation, which can only be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

DATED: April, 1999.

Respectfully submitted,

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